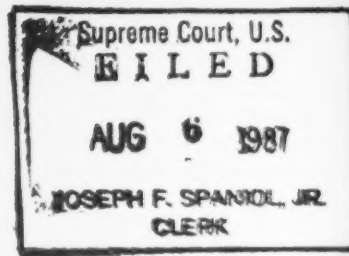


(5)  
No. 86-1747



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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

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ADOLF MEYER,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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REPLY TO THE BRIEF IN OPPOSITION

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INTRODUCTION

The petitioner, by counsel, responds to the Brief in Opposition filed by the respondent, the Government, and replies to specific contentions raised by the respondent.

STATEMENT OF FACTS

In the Argument portion of the Brief<sup>1/</sup> (p. 7), the Government contends

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<sup>1/</sup> "Brief" refers to the Government's Brief in Opposition.

that one of the young males' genitals "are being fondled." The still pictures which each depict one male speak for themselves, and the argumentative characterization is without foundation. The young man in the still photograph is holding his penis at its base. Although the genitals are displayed, there is no action of a nature that could be described as sexual activity or "fondling."

At the hearings for release on bail pending appeal, the Government presented its only expert, a Los Angeles Police Officer with experience in a number of child molest cases whose testimony was contradicted by those with psychiatric and psychological training and experience. No evidence was presented about the police officer's experience in cases involving relations with males 15 and 17 years old with older man.

## ARGUMENT

**I THE REFUSAL OF THE FEDERAL COURT OF APPEALS TO REVIEW THE OBSCENITY OF THE MATERIALS THAT WERE THE BASIS OF CONTESTED LITIGATION WAS A JUDICIAL ABANDONMENT OF THE FIRST AMENDMENT AND VIOLATED THE PRECEDENT OF THIS COURT**

The Government misconstrues the role of the federal judiciary in litigation directly concerned with First Amendment rights. The petitioner did not plead guilty nor did he abandon his rights by entering a conditional plea of guilty under Fed.R.Crim.P. 11(a)(2). The conditional plea of guilty might have narrowed the issues for review, and possibly excluded the review of the issue of "obscenity" or "sexually explicit conduct," but the parties in this case did not take that route.

Defense counsel at the trial presented the issue to the court with the expectancy that the court would not rule favorably on the issue. Counsel's opinion was not binding on the district

court's determination. In his waiver, the petitioner did not "contest for the purpose of appellate review, the sufficiency of the evidence in this case to sustain a conviction"<sup>2/</sup> but that concession as to the presentation offered by the Government in the form of its stipulation did not relieve the district court of its duty to make the required findings pursuant to Fed.R.Crim.P. 23(c) ("In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specifically.").

The district judge not only made the general finding of guilt but specifically found "obscenity" and "sexually

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<sup>2/</sup> The stipulation as to the Government's expert's opinion as to "obscenity" and sexually explicit conduct" (Brief, 3) did not relieve the district court of its responsibility on the issue in the bench trial.



explicit conduct" as alleged by the indictment. The trial judge reached no more than the conclusion for the court did not engage in any Miller or Ferber analysis. The issue was squarely before the district court and expressly presented by the 13 photos incorporated with stipulation of the testimony and evidence that would be adduced in a trial. The district court was aware of the issue and specifically addressed it.

The Court of Appeals, to avoid the issue, relied upon the concession of defense counsel and alluded to a possible post-conviction petition for incompetence of counsel (a 28 U.S.C. 2255 petition). The decision of the Ninth Circuit eliminates the constitutionally required review mandated by this Court. By oath of office, all federal judges promise to enforce constitutional rights, specifically as

reinforced by the precedent of this Court.

Although the Government in its Brief (p. 6-7) argues "there was a factual basis for finding that the photographs were obscene," petitioner contends that was the required function of the Court of Appeals on the required direct review in a criminal case. Petitioner was entitled to the fair scrutiny required of the Court of Appeals, and his position is consistent with the principle of conservation of judicial resources as well as the implementation of established precedent. For the Court to accept the Government's argument that these photos are obscene is to excuse the Court of Appeals from its routine task and transfer it to this Court which engages in a much different type of review in determining whether to grant certiorari.

Federal criminal bench trials are not held merely as convenient accommodations of the parties; the judge had a duty to make a finding on the issues of obscenity and sexually explicit conduct. He did. The Court of Appeals should have reviewed those issues.

To determine the need for review by the Court of Appeals, this Court should review the specific photographs that are the direct basis of a 15-year conviction. The Court will see that these photographs do not meet the well-established requirements for "obscenity" and "sexually explicit misconduct."

The Court of Appeals avoided the issue. The photos in this case, privately possessed and without commercial value or intended value,<sup>3/</sup> are not "hard

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<sup>3/</sup> The materials were examined when the petitioner entered the San Ysidro Port of Entry in a camper.

core" pornography unprotected by the First Amendment. A summary review of the photos will readily establish that they are protected by the First Amendment. Petitioner is entitled to have a federal appellate court review the evidence at the contested trial under the First Amendment standards set by this Court. Preferably, the petitioner would ask that that review be done by the Ninth Circuit, but if not, would ask this Court to conduct that required First Amendment review.

The petitioner was entitled to have an appellate court make "an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." (*Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)). (See also Government Brief, 4-5.)

II THE "CONTRARY TO LAW" PROVISION  
OF 18 U.S.C. 545 APPLIES EQUALLY  
TO 18 U.S.C. 2252(a)(1) SO THAT  
TWO OFFENSES MERGED FOR  
SENTENCING

The Government suggests the elements of the two statutes are the same except for the lack of an obscenity requirement in 18 U.S.C. (Supp. III) 2252 (sexually explicit conduct)<sup>4/</sup>. This is different than the "contrary to law" requirement of 18 U.S.C. 545. The Government prepared the pleadings in this case and referred to 19 U.S.C. 1305, but that allegation does not change the Congressionally created statute of 18 U.S.C. 545. Section 545 is a general statute and would permit the Government to use a number of other

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<sup>4/</sup> This argument assumes the charge of "lewd" conduct in the indictment rather than "lascivious" as required by the statute was harmless error. The petitioner still contends that the 2252 violation as charged required a finding of obscenity.

laws to seek a criminal penalty. Congress had already specifically enacted a criminal penalty for importation of obscene material (18 U.S.C. 1462) (United States v. 12,200 Ft. Reels of Film, 413 U.S. 123 (1973)),<sup>5/</sup> but the Government chose not to use this specific statute (1462) but relied upon the general statute (545) which by its broad terms "contrary to law" of necessity included the Section 2252 violation. The pleadings in this case employed an unconstitutional and erroneous multiplication of the two offenses so as to permit the trial court to impose the maximum on each consecutively.

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<sup>5/</sup> This case, dealing with a 18 U.S.C. 1462 importation forfeiture, was remanded because of the summary dismissal and "no determination of the obscenity of the materials involved has been made." 413 U.S. 123, 129.

III THE PUNISHMENT IMPOSED BY A  
FEDERAL COURT MUST FIT THE  
CRIME FOR WHICH THE PETITIONER  
WAS CONVICTED AND NOT PUNISH  
FOR OFFENSES POTENTIALLY PUNISHABLE  
BY STATE AND FOREIGN AUTHORITIES

The 15-year sentence remains, but is now suspended. It is not mooted by the modification of the district court in granting structured probation (the conditions of which were not implemented because the INS deported the defendant for these offenses). The remainder of the 15 years confinement may be imposed if the petitioner violates probation. The petitioner's claim is not moot. *United States v. Campos-Serrano*, 404 U.S. 293, 294 n. 1 and 2 (1971) (defendant's deportation while on probation does not moot case).

The Court of Appeals created unlimited discretion for federal judges at sentencing by its refusal to insure the sanction is constitutionally appropriate to the offense charged. Due

process requires some correlation between the wrong done and the sentence imposed.

The other potentially criminal penalties which might be enforced in state jurisdictions was not the offense found here.

The Government also fails to note that Section 2252 until 21 May 1984 (Pub.L. 98-292) applied to importations "for the purpose of sale or distribution of sale," and the petitioner privately and confidentially possessed these materials. Given that the offense occurred on 30 June 1984 (CR 37:1-2), these actions of the petitioner would not have been in violation of that federal law.<sup>6/</sup>

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<sup>6/</sup> The district court dismissed earlier charges arising out of ex post facto application of section 2252. See United States v. Meyer, 602 F.Supp 1476 (1984).



This Court has a unique responsibility to oversee the federal judiciary in its application of discretion at sentencing. In addition to the constitutional requirement of due process to insure that the sentence is proportional to the charge (*Solem v. Helm*, 463 U.S. 277 (1983)), the fundamental misapplication of discretion approved by the Court of Appeals here needs corrective action by this Court. There must be some limit to discretion, and the 15-year sentence to confinement for the 13 photos brought across the border at one time transgressed the legal, humane, and reasonable limits of discretion. The limit of sentencing discretion in federal cases needs clarification or at least the disproportionality here should be disapproved.

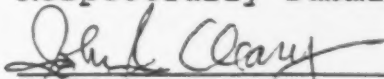
#### CONCLUSION

Because of the significant constitutional questions relating to obscenity

and sentencing raised by this petitioner, the Court is requested to issue a writ of certiorari to review this conviction. In the alternative, it is requested that certiorari be granted, the judgment vacated, and the case remanded to the Court of Appeals to conduct the review required by *Miller v. California*, 413 U.S. 15 (1973) and *New York v. Ferber*, 458 U.S. 747 (1982).

29 July 1987.

Respectfully submitted,



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